

OCT 22 1979

WILLIAM D. BRYCE, JR., CLERK

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IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1979

No. 78-1911

ROB'T L. GUYLER CO.  
In Its Own Behalf and On Behalf of  
THE McCARTY CORPORATION,  
Petitioner

v.

THE UNITED STATES OF AMERICA,  
Respondent

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PETITION FOR REHEARING  
OF ORDER DENYING CERTIORARI

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Attorney for Petitioner

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To the Honorable, the Chief Justice and Associate  
Justices of the Supreme Court of the United States:

Petitioner respectfully requests that this  
Court grant rehearing of its order dated October 1,  
1979, which denied certiorari, and that the Court  
now grant certiorari.

The petition for certiorari previously filed  
herein presented the question of whether or not a  
federal court may refuse to apply a federal statute

as written (Section 2305(b), Title 10, United States Code (1970) ). The petition for certiorari also complained that the federal court had invaded the province of Congress by adding qualifications to the statute. At the time the petition for certiorari was filed, the federal courts were solidly opposed to the judicial errors complained of by Petitioner.

However, on June 27, 1979, two days after the petition for certiorari was filed in this case, the Supreme Court of the United States handed down its decision in United Steelworkers of America, AFL - CIO - CLC v. Brian F. Weber et al., No. 78-432; Kaiser Aluminum & Chemical Corporation v. Brian F. Weber et al., No. 78-435; and United States et al. v. Brian F. Weber et al., No. 78-436, 47 Law Week 4851 (June 27, 1979), on writs of certiorari to the United States Court of Appeals for the Fifth Circuit.

Weber presented a divided and partly silent court. Mr. Justice Brennan delivered the opinion, in which Justices Stewart, White, Marshall and Blackmun joined. Justice Blackmun filed a separate concurring opinion. Chief Justice Burger filed a dissenting opinion. Justice Rehnquist also filed a dissenting opinion, in which Chief Justice Burger joined. Justices Powell and Stevens took no part in the consideration or decision of the cases, so their views are not known.

In Weber, a majority of the Supreme Court held that in statutory construction "it is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers' " (Id., p. 4853). The majority then examined the legislative history of Title VII, and concluded that the statute does not condemn all affirmative action plans.

The majority opinion, the two dissenting opinions, and the concurring opinion in Weber raise (but do not answer) serious, fundamental questions of how far judges may go in interpreting and applying statutes. The federal court in our present case has gone this far - it has added three requirements to a statute not found in the statute, and has refused to grant relief under the statute, all without a single word of statutory construction and without any examination of the statute's legislative history, but rather strictly upon the will and initiative of the court.

By denying certiorari in this case, the Supreme Court would add to the confusion and the uncertainties created by the Weber case. This is especially so because the petition for rehearing in Weber was denied the same day (October 1, 1979) that the petition for certiorari in our present case was denied. The actions of the Supreme Court in the two cases were thus announced concurrently.

Since Weber has occasioned considerable uncertainty on the subject of the power of courts to construe and apply statutes, compelling reasons are evident why the questions presented in this case should be reviewed and determined by the Supreme Court. This is especially true in that neither Justice Powell nor Justice Stevens have yet spoken on these issues. The unanswered questions raised by Justice Rehnquist and Chief Justice Burger in their dissenting opinions in Weber need to be resolved.

This case is a perfect vehicle for the resolution of these questions and issues. This case does not involve the emotional and divisive elements inherent in civil rights cases such as Weber; ours is a straightforward government contract case which

presents the full range of statutory construction problems raised by Weber but not resolved in that case. Granting certiorari in the present case would have the following results:

1. Justice Stevens could make known his views regarding statutory construction (he took no part in Weber).
2. Justice Powell could likewise make known his views regarding statutory construction (he took no part in Weber).
3. Justice Burger could expand his views regarding statutory construction (he dissented on the narrow issues in Weber).
4. Justice Rehnquist could further develop his views regarding statutory construction (he also dissented within the narrow issues in Weber).
5. Justice Blackmun could further expand his views as outlined in his concurring opinion in Weber.
6. The remaining Justices could go beyond the limits and bounds of their holding in Weber and announce their views in broader areas of statutory construction than those found in Weber.

"Hard cases make bad law" observed Chief Justice Burger in Weber (id., p. 4858). Ours is not a hard case, and it can unite a fragmented and partially silent Supreme Court.

### CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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### CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

William D. Bryce